

GLENN B. SHELDON

IBLA 92-1

Decided February 8, 1994

Appeal from a decision of the Area Manager, Lower Gila Resource Area, Arizona, Bureau of Land Management, denying application to purchase mineral resources No. AZA 25508.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Generally--Materials Act--Public Lands

The decision to sell mineral materials is discretionary. When BLM considers relevant factors and concludes that removal of boulders from an area classified as Category I desert tortoise habitat would cause adverse impacts on the tortoise habitat which cannot be mitigated, BLM may properly reject an application for sale of the boulders.

APPEARANCES: Glenn B. Sheldon, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Glenn B. Sheldon has appealed from an August 30, 1991, decision by the Area Manager, Lower Gila Resource Area, Arizona, Bureau of Land Management (BLM), denying his application to purchase 2,000 tons of granite boulders from BLM lands in sec. 11, T. 4 S., R. 1 W., Gila and Salt River Meridian, Arizona.

On July 16, 1991, Sheldon filed a mineral materials sales application with BLM pursuant to 43 CFR 3610.1-1, seeking to purchase ornamental stone. On July 19, Sheldon filed a detailed addendum to his application, describing the type of boulders he sought to purchase, the areas they would come from, the contemplated method of removal, the proposed access, and the environmental protection and reclamation steps he would take. He described the material as surface granite rocks, ranging in weight from 1,000 to 4,000 pounds. He stated he would lift the rocks by boom or crane and remove them by truck or trailer.

In August 1991, Sheldon, a BLM geologist, and several wildlife specialists inspected the proposed sale area. An August 13, 1991, memorandum

by the geologist states that the area is classified as interim Category I desert tortoise habitat. This memorandum states that "[a] site inspection was conducted because the area of the proposed sale had not been inventoried in the field prior to the interim categorization" (according to the decision appealed from, BLM had classified the proposed sale area as interim Category I desert tortoise habitat in 1989). The memorandum also notes that tortoise scat, bones, shell fragments, and a live tortoise were found during the field check.

On August 27, 1991, one of the wildlife specialists who participated in the site inspection recommended rejection of the proposed purchase and sale, stating in pertinent part:

The tortoise sign found is consistent with some of the best habitat and highest density populations in southwestern Arizona. In this area desert tortoise habitat is directly associated with boulders. Therefore, boulder sale will impact desert tortoise. Immediate impacts could be reduced by stipulating the time of year and the size of boulders to be removed, however the long term residual impacts cannot be mitigated. The loss of boulders on this site would equate directly to loss of desert tortoise habitat. This [sale] proposal is not consistent with the goals for Category I desert tortoise habitat as outlined in the BLM Rangewide Plan for the management of desert tortoise habitat.

The Category I habitat classification was made pursuant to BLM's Desert Tortoise Habitat Management on the Public Lands: A Rangewide Plan, December 1988 (Rangewide Plan). Category I goals are to "[m]aintain stable, viable populations and protect existing tortoise habitat values; [and to] increase populations where possible" (Rangewide Plan at 1).

The Area Manager rejected the proposed sale. He noted that during the field inspection the area had been found to be Category I habitat, tortoise in the Sonoran desert are found in the vicinity of granite boulder outcrops, and that the tortoise burrow under the boulders for daytime shelter. He concluded that removal of boulders would equate to loss of desert tortoise habitat, the long-term residual impacts of boulder removal could not be mitigated, and boulder removal would be contrary to Category I goals.

The Area Manager also cited 43 CFR subpart 3600, the regulations governing disposal of mineral materials, noting that the policy stated in those regulations is that mineral materials are to be disposed of in a manner which minimizes environmental damage. This regulation provides that no mineral materials may be disposed of "if the Secretary determines that the aggregate damage to public lands and resources would exceed the benefits to be derived from the proposed sale." 43 CFR 3600.0-4. Under 43 CFR 3601.1-3, when the authorized officer receives a proposal for the sale or use of mineral materials, he is to "complete an environmental review to insure that unnecessary or undue degradation is prevented."

As his first argument Sheldon asserts that the proposed sale site should not be classified as Category I habitat because the Arizona species of desert tortoise is not listed as an endangered species. He describes the proposed sales site as a "slim finger," which is not typical of the main habitat area, and notes that the site is in close proximity to private land and contains ample signs of human impact such as shot shells, trash, and tire tracks, which, according to Sheldon, militate against Category 1 habitat classification.

Sheldon next asserts that the site does not contain a high-density population. His impression, based on the August 13, 1991, field examination was that the tortoise population was "at best stable, but probably declining."

Sheldon also asserts that boulder removal could easily be mitigated by removal of boulders smaller than those preferred by the tortoises and by the exposure of new boulders when the old ones are removed.

As his last argument Sheldon suggests that BLM must consider the multiple use objectives stated in the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 (1988), and that BLM abused its discretion when denying the proposed sale.

Sheldon was correct when stating that the Sonoran population of the desert tortoise had not been listed as a threatened species under the Endangered Species Act, 16 U.S.C. § 1536 (1988). ^{1/} However, that population has been classified as a candidate species for listing. In any event, the fact that the Sonoran population has not been designated as an endangered species does not mandate a conclusion that BLM erred when classifying the area as Category I habitat. That classification was made pursuant to BLM's Rangewide Plan.

When formulating the Rangewide Plan, BLM carried out its FLPMA responsibility to manage the public lands for multiple use, which encompasses a "combination of balanced and diverse resource uses that take into account the long-term needs of future generations for renewable * * * resources, including * * * wildlife." 43 U.S.C. §§ 1701(a)(7), 1732(a), and 1702(c) (1988). BLM is authorized to "provide food and habitat for * * * wildlife," 43 U.S.C. § 1701(a)(8) (1988), and may develop land-use plans for that purpose. BLM's Rangewide Plan states that BLM "is committed to maintaining viable tortoise populations in Category I and II habitats through implementation of specific Management Actions." *Id.* at iii. The Rangewide Plan lists the goals and criteria for each of the three categories of desert tortoise habitat. Under the Rangewide Plan, BLM policy "requires that habitats of Federal candidate species be managed and/or conserved to ensure that BLM actions do not contribute to the need to list the species." *Id.* at 1.

^{1/} The Sonoran population of the tortoise, whose habitat is described as the area south and east of the Colorado River in Arizona and Mexico, was excluded from the U.S. Fish and Wildlife Service (FWS) threatened species designation. 50 CFR 17.11.

[1] In cases involving BLM's use of discretionary authority to resolve conflicts regarding the use of public lands, the issue is one of whether BLM has adequately considered all of the factors involved when exercising its authority. The Board will uphold BLM's decision if the appellant does not show that BLM did not adequately consider the factors, including the question of whether less stringent alternatives would accomplish the intended purpose. American Motorcycle Association, District 37, 119 IBLA 196, 199 (1991), and cases cited therein.

After proceeding in accordance with the Rangewide Plan the BLM field inspection team found the proposed sale site to be Category I tortoise habitat. In addition, it found that the boulders constitute a crucial element of tortoise habitat, 2/ and the habitat would be lost if boulders were removed, and the impact could not be mitigated. BLM has based its rejection upon the professional opinion of its biologists. Although there is no doubt that Sheldon does not consider BLM's biologists' opinion to be correct, he has submitted no evidence that tortoise habitat would not be adversely affected by the removal of boulders. A statement of disagreement is insufficient to demonstrate error. Similarly, appellant's conclusions regarding the size and viability of the tortoise population, its habitat configuration, and the effect of human impact are of little probative value without substantiating evidence. Standing alone, Sheldon's views do not demonstrate error in BLM's classification of the area as Category I habitat.

The Area Manager's decision is in harmony with BLM's responsibilities under FLPMA, accords with the Rangewide Plan and applicable regulations, and is supported by the record. We find nothing to support a conclusion that denial of the proposed sale was a not a sound exercise of discretion.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

2/ See Desert Tortoise Population Studies at Four Plots in the Sonoran Desert, Arizona at 3, 38, 39, 53, 71. This document was compiled by the Wildlife Management Division, Arizona Game and Fish Department, for submission to FWS.